

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KOU XIONG,

Defendant-Appellant.

UNPUBLISHED
September 3, 2009

No. 282087
Macomb Circuit Court
LC No. 2005-002939-FC

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

MEMORANDUM.

Following a remand by this Court for resentencing,¹ defendant appeals by right the sentence imposed on his jury trial conviction of criminal sexual conduct in the first degree, MCL 750.520b(1)(a). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 420 to 600 months in prison. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim of error on appeal is that the trial court failed to obtain an updated presentence investigation report (PSIR) prior to resentencing. A party may waive the production of an updated presentence report at resentencing unless the previous report is manifestly outdated. *People v Hemphill*, 439 Mich 576, 582; 487 NW2d 152 (1992). Here, after the trial court noted that it had the original presentence investigation report it observed that, "there's nothing that's been changed or altered since that day. Your client's been incarcerated." The trial court asked defense counsel whether he had anything to say on defendant's behalf and counsel replied with concerns about defendant's prior convictions. After resolving the issue, the trial court asked whether counsel had anything further; counsel replied that he did not think he had anything additional to add.

This approval of the information in the PSIR waived any claim of error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). However, even were we to treat this issue as merely unpreserved, we would find that defendant has not shown that he is entitled to relief. A forfeited claim of error is reviewable for plain error affecting defendant's substantial rights.

¹ *People v Xiong*, unpublished per curiam opinion of the Court of Appeals, issued September 25, 2007 (Docket No. 270213).

People v Carines, 460 Mich 750, 763-764; 597 NW2d 130 (1999). “The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.* (citations omitted). In this case, defendant argues only that he was prejudiced by the fact that the presentence report was not updated. He points to no updated information that the trial court should have been provided before imposing sentence on remand. Nor does he specifically challenge the validity any of the information in the initial PSIR. Defendant has not shown that reversible plain error occurred in this case.²

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

² Defendant’s concurrent claim that he and counsel were not provided with the opportunity to review the PSIR prior to resentencing is specious in light of counsel’s assertions to the contrary during the resentencing hearing and counsel’s objections to a portion of the prior conviction information in the report.